

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **HARLAN P. McNUTT,**)

4 **Appellant,**)

5 **v.**)

6 **OLYMPIC AIR POLLUTION**)
7 **CONTROL AUTHORITY,**)

8 **Respondent.**)
9 _____)

PCHB No. 92-77

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

10 This matter came before the Washington State Pollution Control Hearings Board
11 (Board) on October 5, 1992, in Lacey, Washington. Present for the Board were Annette S.
12 McGee, Presiding, Chairman Harold S. Zimmerman, and Attorney Member Robert V. Jensen.

13 Appellant Harlan P. McNutt appeared pro se, and respondent Olympic Air Pollution
14 Control Authority (OAPCA) appeared through Attorney at Law, Fred D. Gentry.

15 Court Reporter Randi Hamilton of Gene Barker & Associates, Inc., Olympia, WA,
16 recorded the proceedings.

17 The appeal was for four OAPCA civil penalties issued to Dr. McNutt for alleged
18 asbestos violations totaling ten thousand fifty dollars (\$10,050).

19 Witnesses were sworn and testified, exhibits were examined and arguments of the
20 parties were considered. From the above, the Board makes these

21 **FINDINGS OF FACT**

22 **I**

23 On March 31, 1992, the OAPCA Control Officer, Charles Peace, issued four notices
24 of Civil Penalties for the alleged violations of OAPCA, Regulation 1, all occurring on the
25

26 **FINAL FINDINGS OF FACT,**
27 **CONCLUSIONS OF LAW AND ORDER**
 PCHB No. 92-77

(1)

1 property located at 212-218 E. Front Street, City of Port Angeles, State of Washington. The
2 penalties were:

- 3
- 4 1. Fifty dollars (\$50) for violation of Section 14.07(a) of OAPCA's Regulation 1,
5 "Failure to file written notification prior to demolition of structure";
 - 6 2. One thousand dollars (\$1,000) for violation of Section 14.09(a) of OAPCA's
7 Regulation 1, "Causing and allowing the wrecking/demolition of a structure before the
8 removal of all asbestos materials";
 - 9 3. Three thousand dollars (\$3,000) for violation of Section 14.09(b)(1) of OAPCA's
10 Regulation 1, "Asbestos removal conducted by non-certified workers"; and
 - 11 4. Six thousand dollars (\$6,000) for violation of Section 14.11(b) of OAPCA's
12 Regulation 1, "Failure to follow proper handling and disposal methods."

13 II

14 McNutt filed an appeal on April 29, 1992, which became PCHB 92-77.

15 III

16 In determining the amounts cited in II, Peace followed the October, 1991 OAPCA
17 adopted guidelines for assessing civil penalties for asbestos violations:

18 1st violation	\$50-\$500
19 2nd violation	\$1,000-\$2,000
20 3rd violation	\$3,000-\$5,000
21 4th violation	\$6,000-\$8,000

22 Although all four violations were discovered at the same time from the same incident,
23 Peace treated them as repeat violations. It is this Policy and the amounts that McNutt
24 challenges.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

IV

Dr. Harlan McNutt, who owns the property in question, near the intersection of Front and Lincoln Streets, does not dispute that asbestos was found on the site, but claims the penalties are an "overkill."

V

The old structures on the site when he purchased the property about three years ago were probably built in the early 1940s. They had stucco fronts, with the other sides covered with a shake material, and all were of a run-down nature.

McNutt wanted to demolish them and build a planned new development.

VI

McNutt appeared before the Port Angeles City Council with his plans. The proposed plans became controversial and a lawsuit evolved.

VII

McNutt personally applied for a demolition permit which was issued September 5, 1991. He was told nothing about asbestos requirements or regulations. The only special condition written on the permit was, "Sanitary Sewer to be capped."

VIII

On December 12, 1991, the OAPCA received a telephone complaint from Rick White, Port Angeles office of the Washington State Department of Labor & Industries (L&I), that the buildings being demolished at the site in question contained asbestos which was scattered around the area. There were no warning signs posted. The demolition site was not secured, and was accessible to the public.

IX

On December 16, 1991, OAPCA's Air Inspector, Greg O'Connor, called McNutt's architect Tim Haley, and discussed the complaint, the need for certified asbestos workers, and other requirements. Haley told O'Connor that he was acting as McNutt's agent and would take care of it.

O'Connor also told Haley that he would waive the required ten day notice period, which occurs between the "Application of Notice of Intent to Remove Asbestos" and the actual beginning of the project.

A follow-up call was made to Haley the next day on December 17, 1991.

X

O'Connor also called Rick White back on December 17, 1991 and was told by White that L&I had the situation under control. By this time L&I had issued a stop work order and all work had stopped.

XI

O'Connor made a site visit on December 23, 1991, and took photographs of the demolition and suspected asbestos on the ground, next to the sidewalk on Front Street. He also took three samples from three different locations on the site and sent them to the Department of Ecology's lab for testing.

XII

McNutt, a former Pierce County Health Officer and Secretary of the State Department of Social and Health Services, testified that he was unaware of the asbestos in the structures. However, after being notified, he and his agent promptly tried to find certified asbestos workers.

McNutt found that obtaining certified handlers of asbestos to come to Port Angeles for a small project around the holidays was difficult. However, on December 20, 1991, before OAPCA's actual site visit, the authority received a copy of a bid to do the job from Tachon Inc./Sublett, 2010A 112th E. Street, Tacoma, WA.

XIII

The first "Notice of Intent to Remove or Encapsulate the Asbestos" was filed with the OAPCA by Tachon on January 31, 1992. An amended notice was filed on February 6, 1992. Removal of asbestos was completed on February 10, 1992.

XIV

The lab analysis dated January 27, 1992, signed by Analyst Susan Davis showed the following:

Sample number 91-12-23/1100, concrete siding, an average of twenty-five (25) percent chrysotile;

Sample number 91-12-23/1101, wall board, no asbestos; and

Sample number 91-12-23/1102, concrete siding, an average of thirty (30) percent chrysotile.

XV

Dr. McNutt testified that asbestos comes in a variety of forms, and the type found was not that harmful, and there was no actual proven harm done to the environment or public. He contends that this should be taken into consideration when penalties are determined.

XVI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**
PCHB No. 92-77

(5)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CONCLUSIONS OF LAW

I

The Board takes official notice of the OAPCA Regulation 1, Article 14, which is on file with this Agency.

II

The Board has jurisdiction over the parties and the subject matter of this appeal. RCW 43.21B.110 and 43.21B.310. Because this is an appeal of civil penalties, Respondent OAPCA has the burden of proof. WAC 371-08-183.

III

Dr. McNutt argues that the total civil penalty of ten thousand fifty dollars (\$10,050) should be dismissed or at least reduced for the following reasons: He had no knowledge that there was asbestos in the buildings or no prior notification from the City about asbestos regulations; he did not intentionally commit the violations; the violations were four separate offenses, not repeated offenses; he maintains the penalties are unreasonable for the small amount of "low-grade" asbestos. There was no proven harm done to the environment and public; and, he immediately tried to respond by hiring certified asbestos handlers to remove the asbestos according to regulations.

IV

The Board recognizes that the violations were unintentional, but that is not a defense for violations committed under the Clean Air Act (RCW 70.94.040). The Board has previously held that the Washington Clean Air Act is a strict liability statute, and committing violations that are not intentional is not enough to mitigate the penalties.

V

However, the Board finds that McNutt and/or his agent acted promptly to try to correct the problem, once notified.

We also find that there is some ambiguity in the language of OAPCA's guidelines for setting the penalties. The guidelines state that "It is the Policy of (OAPCA) to assess civil penalties for repeat offenses" (emphasis added), and that "Each case must be evaluated individually." Therefore, the Board in considering all of the Findings of Facts in this case concludes that there is a need for mitigation of the assessed amounts.

VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
From the foregoing, the Board issues this:

ORDER

The Board affirms OAPCA's Civil Penalty Orders of four violations totaling ten thousand, fifty dollars (\$10,050), but suspends nine thousand, five hundred fifty dollars (\$9,550) on the condition that appellant does not violate OAPCA's Regulation 1, Section 14 for two years, from the date of this order, leaving five hundred dollars (\$500) due to OAPCA.

DONE this 29th day of October, 1992.

POLLUTION CONTROL HEARINGS BOARD


ANNETTE S. MCGEE, Presiding


HAROLD S. ZIMMERMAN, Chairman


ROBERT V. JENSEN, Attorney Member

P92-77F